

Explaining Disqualification: An Empirical Review of Motions for the Removal of Counsel

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Motions to disqualify counsel for conflicts of interest, though frequent, are shrouded in uncertainty. To dispel this uncertainty, the author conducts an empirical study of 1,283 motions for disqualification, providing a breakdown of the variables which influence the courts' decision-making processes in motions for disqualification and some much-needed clarity about the outcomes of these motions.

*Although the Supreme Court of Canada established requirements for motions to disqualify opposing counsel in *MacDonald Estate v Martin* and elaborated on its guidance in *R v Neil* and *Canada National Railway Co v McKercher*, lower court decisions have been unpredictable. The author's empirical study reveals that uncertain outcomes of disqualification motions present three concerns. First, it is difficult for counsel to predict the likely outcome of a disqualification motion, so a client will not know whether to expend resources on the motion. Second, lawyers and law firms cannot evaluate whether the measures they have implemented to manage potential conflicts in their practices will be sufficient. And third, public trust in the integrity of the justice system may be diminished when courts find that there is a conflict of interest, but elect not to order disqualification.*

Through this empirical study, the author responds to these concerns and provides practical guidance for law firms and lawyers. The author finds that disqualification motions are more likely to succeed when they are premised on a well-founded concern about disclosure of relevant confidential information or a breach of the duty of loyalty to a current client, rather than general concerns about the administration of justice or unprofessional conduct. The author recommends that firms implement screening measures which comply with all law society guidelines before a transferring lawyer with a potential conflict begins work, and notes that while such measures cannot guarantee a firm will not be disqualified, disqualification in such circumstances is exceedingly rare. Finally, the author concludes that the jurisprudence on disqualification of counsel demonstrates that the courts place high value on

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trust and confidence in the lawyer-client relationship, and provides little reason to worry about loss of public trust in the administration of justice.

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Introduction

Since the Supreme Court of Canada's 1990 decision in *MacDonald Estate v Martin*,¹ in which the Court removed a law firm from the record because a junior associate joined the firm after acting for (and receiving confidential information from) the opposing party, motions to disqualify opposing counsel from acting on a case have been a regular occurrence in litigation. Despite their frequency, however, the law respecting disqualifying conflicts of interest remains difficult for lawyers to understand and apply. Even when a conflict

1. [1990] 3 SCR 1235, 77 DLR (4th) 249 [cited to SCR].

of interest is identified—whether by the conflicted counsel themselves, the opposing party, or the court—it is not well-settled when a court will order the disqualification of counsel. Indeed, writing for the Supreme Court of Canada in *R v Neil*, Binnie J held: “It is one thing to demonstrate a breach of loyalty. It is quite another to arrive at an appropriate remedy.”²

In 2002, the Court in *Neil* set out the “bright line” rule for conflicts of interest arising from lawyers’ duty of loyalty to their clients: “[A] lawyer may not represent one client whose interests are directly adverse to the immediate interests of another current client — even if the two mandates are unrelated — unless both clients consent”.³ But nearly two decades later, the consequences of crossing the bright line remain far from clear. No remedy was ordered in *Neil*. Justice Binnie explained that various other avenues of redress were available to clients whose lawyers breach their duty of loyalty, including law society complaints, which could result in disciplinary action, and civil actions against the lawyer for compensation.⁴

In 2013, the Supreme Court of Canada had the opportunity to clear up the uncertainty surrounding when disqualification will be ordered in a third leading conflict of interest case, *Canadian National Railway Co v McKercher LLP*.⁵ Canadian National Railway Company (CN) sought to disqualify its former law firm for a breach of the duty of loyalty; the law firm had “fired” CN as a client in order to commence a class action against it.⁶ Although the Court reaffirmed the bright line rule and confirmed that by firing its client to commence an action against it the law firm had breached its duty of loyalty, the *McKercher* decision provided scarce guidance as to the practical consequences of these findings.⁷ The Court articulated numerous factors to be considered in assessing whether disqualification “may be required”,⁸ but neglected to apply these factors to the case before it. It instead remitted the issue to the motion

2. 2002 SCC 70 at para 36.

3. *Ibid* at para 29 [emphasis omitted].

4. Interestingly, although *R v Neil* is a leading case on lawyers’ conflicts of interest, disqualification of counsel was not in issue; the client sought a stay of criminal proceedings, which was denied. See *ibid* at para 37.

5. 2013 SCC 39 [*McKercher*].

6. See *ibid* at paras 4–5.

7. See Brooke MacKenzie, “The Not-So-Bright Line Rule: Lingering Questions About Lawyers’ Duty to Avoid Conflicting Interests – *CN Railway v McKercher*”, Case Comment, (2014) 42:4 Adv Q 422 [MacKenzie, “Not-So-Bright Line Rule”].

8. *McKercher*, *supra* note 5 at paras 61–65.

judge to consider in accordance with the Supreme Court of Canada's reasons—and the issue was never decided below.⁹

In a recent decision of the Court of Appeal for Ontario, this ambiguity manifested in a different way. *Ontario v Chartis Insurance Company of Canada* concerned a conflict of interest allegation that arose when a law firm that had carriage of an active insurance coverage dispute hired a lawyer who had acted for the opposing party.¹⁰ Alert to potential confidentiality concerns, before the transferring lawyer commenced work the law firm implemented comprehensive measures that met all Law Society of Upper Canada guidelines for conflict screens, with a view to ensuring that there was no risk of disclosure of the opposing party's confidential information. The Court of Appeal nevertheless disqualified the firm from continuing to act, holding: "Canadian courts have typically held that compliance with the [law society screening] guidelines provides sufficient protection for the migrating lawyer's former client That said, while highly persuasive, compliance is not determinative."¹¹

There are important practical ramifications of the courts' insufficient guidance regarding what constitutes a disqualifying conflict of interest. First, it is difficult to predict the likely outcome of a disqualification motion. This leaves clients who likely already feel disheartened with the legal system as a result of their former lawyer's apparent conflict in the unenviable position of deciding whether to expend significant resources on a disqualification motion—which will inevitably delay the adjudication of their dispute on the merits—without an adequate understanding of whether they can achieve their desired outcome.

Second, lawyers and law firms face uncertainty when managing potential conflicts in their practices. In 1990 in *Martin*, the Supreme Court of Canada called upon the governing bodies of the legal profession to develop standards for institutional conflict screening mechanisms that would satisfy the public that no disclosure of confidential information would occur when a lawyer transfers to a firm that is acting adverse to the lawyer's former client. The Canadian Bar Association and provincial law societies developed such standards, and from that time until the Ontario Court of Appeal's decision in *Chartis*, firms could be confident that if a lateral hire created a potential conflict they could nevertheless continue to act if they addressed that conflict through the timely implementation of a comprehensive conflict screen. *Chartis* firmly

9. See *ibid* at para 67. See also Brent Cotter & Richard Devlin, "Three Strikes and You're Out . . . Or Maybe Not: A Comment on *Canadian National Railway Co v McKercher LLP*", Case Comment, (2013) 92:1 Can Bar Rev 123 at 143, n 98.

10. 2017 ONCA 59 [*Chartis* CA]. By way of disclosure, the author acted as co-counsel to the appellant before the Court of Appeal for Ontario in this matter.

11. *Ibid* at para 48.

established that even strict compliance with law society screening guidelines may not be enough to guard against being removed from the record, making conflict management more precarious for the practising bar.

Third, and perhaps most importantly, where the courts hold that a lawyer has a conflict of interest but fail to order disqualification, there is a real risk of a loss of public trust in the integrity of the administration of justice. In *McKercher*, McLachlin CJ rightly noted: “Disqualification may be required to send a message that the disloyal conduct involved in the law firm’s breach is not condoned by the courts, thereby protecting public confidence in lawyers and deterring other law firms from similar practices.”¹² Observing the result of cases like *Neil* and *McKercher*, in which no remedy was ordered in respect of a lawyer’s conflict of interest, it is difficult not to conclude that, at times, lawyers are able to breach their duty of loyalty and professional responsibilities with impunity.¹³

The legal profession and litigants require a better understanding of the circumstances in which counsel will be disqualified from acting due to a conflict of interest.

This paper discusses the findings of a comprehensive empirical study examining how courts across Canada have understood and applied the law respecting lawyers’ conflicts of interest. Specifically, the study considered the decisions in 1,283 motions for the removal of counsel between 1990 and 2018—all Canadian reported decisions on disqualification motions since the Supreme Court of Canada’s decision in *MacDonald Estate v Martin*¹⁴—evaluating: the basis on which the motion was asserted; the basis on which any conflict was found; the court’s findings regarding any screening mechanisms employed; any findings that the motion was brought for tactical reasons; and the remedy ordered.

The data collected and analyzed in this study discloses prevailing trends in the judicial determination of conflict of interest allegations and helps demystify when and why courts will order the disqualification of counsel.

Part I of this article summarizes how Canadian common law has developed to address allegations that lawyers ought to be disqualified from continuing to act due to a conflict of interest, considering four leading Supreme Court of Canada decisions—*MacDonald Estate v Martin*, *R v Neil*, *Celanese Canada Inc*

12. *McKercher*, *supra* note 5 at para 63.

13. See also *MediaTube Corp v Bell Canada*, 2014 FC 237 (another case in which a law firm fired a client to pursue a more lucrative action against that client, but was not disqualified from acting in the new action).

14. The study considered all cases until the end of 2018. An explanation of how the decisions forming the dataset of this study were determined and collected can be found at Part II.B, *below*.

v Murray Demolition Corp,¹⁵ and *Canadian National Railway Co v McKercher LLP*¹⁶—as well as two decisions of the Court of Appeal for Ontario. Part II outlines the study’s goals and methodology. Part III reviews the data and examines the study’s findings. Part IV discusses conclusions drawn from the data, as well as insights gleaned from the study that lawyers can consider when advising clients and managing their practices.

I. Background: Development of the Law Respecting Lawyers’ Conflicts of Interest

A. Former Clients and Other Conflicts Arising from the Possession of Relevant Confidential Information

(i) *MacDonald Estate v Martin*

The starting point on any motion for disqualification of counsel is the Supreme Court of Canada’s 1990 decision in *MacDonald Estate v Martin*.¹⁷ *Martin* arose in the context of an action in which a junior lawyer who had acted for the appellant took a job with the law firm acting for the respondent. The appellant sought to remove the firm due to the risk that her confidential information could be disclosed or used against her.¹⁸

Although divided on how to approach the issue, the Supreme Court of Canada was unanimous that the law firm had to be disqualified from acting.¹⁹

Writing for the majority, Sopinka J noted that the Court must be concerned with competing policy values that arise when one party seeks to disqualify her opponent’s lawyer from acting: “[T]he concern to maintain the high standards of the legal profession and the integrity of our system of justice”, “the countervailing value that a litigant should not be deprived of his or

15. 2006 SCC 36 [*Celanese*].

16. A fifth Supreme Court of Canada decision, *Strother v 3464920 Canada Inc*, is often considered alongside these as one of the leading conflicts cases, but is not discussed in this paper because (a) it was not a disqualification motion, but an action in breach of fiduciary duty; and (b) it arose out of a conflict between the client’s interest and the lawyer’s own interest, a situation that only rarely forms the basis for a disqualifying conflict of interest (as will be seen below). See 2007 SCC 24.

17. See *supra* note 1.

18. See *ibid* at 1239–40.

19. See *ibid* at 1264–65.

her choice of counsel without good cause”, and “the desirability of permitting reasonable mobility in the legal profession”.²⁰

He reviewed international common law approaches to conflicts arising from lawyers transferring firms before landing on the “correct approach”: “[T]he test must be such that the public represented by the reasonably informed person would be satisfied that no use of confidential information would occur. That, in my opinion, is the overriding policy that applies and must inform the court in answering the question: Is there a disqualifying conflict of interest?”²¹

Justice Sopinka held that disqualification motions “require two questions to be answered: (1) Did the lawyer receive confidential information attributable to a solicitor and client relationship relevant to the matter at hand? [and] (2) Is there a risk that it will be used to the prejudice of the client?”²²

Addressing the first question, Sopinka J noted a potential dilemma: to explore in-depth whether the lawyer received confidential information would require disclosure of precisely the confidential information for which protection is sought—which would defeat the whole purpose of the motion. He addressed this by establishing a presumption:

[O]nce it is shown by the client that there existed a previous relationship which is sufficiently related to the retainer from which it is sought to remove the solicitor, the court should infer that confidential information was imparted unless the solicitor satisfies the court that no information was imparted which could be relevant. This [would] be a difficult burden to discharge.²³

On the second question, whether the confidential information would be misused, the Court held that a lawyer who has relevant confidential information cannot act against her former client—full stop. In such cases, disqualification is automatic, because the lawyer cannot compartmentalize her mind to screen out what information has been gleaned from the former client and what was acquired elsewhere.²⁴

The answer was less clear with respect to the lawyer’s colleagues in the firm. This is the main point on which the majority and concurring justices disagreed—Cory J, in his concurring opinion supported by two other justices, held that the lawyer’s knowledge ought to be imputed to the rest of the firm,

20. *Ibid* at 1243.

21. *Ibid* at 1259–60.

22. *Ibid* at 1260.

23. *Ibid*.

24. See *ibid* at 1261.

such that if one lawyer cannot act, no member of the firm can act.²⁵ In the majority's view, this was "overkill", because a reasonable member of the public would not "necessarily conclude that confidences are likely to be disclosed in every case despite institutional efforts to prevent it".²⁶

Instead, the majority held that the Court should infer that lawyers who work together share confidences (such that other members of the transferring lawyer's firm would also be disqualified from acting), but that this inference could be rebutted if the Court was "satisfied on the basis of clear and convincing evidence, that all reasonable measures have been taken to ensure that no disclosure will occur by the 'tainted' lawyer to the member or members of the firm who are engaged against the former client".²⁷ Justice Sopinka suggested that such "reasonable measures" would include institutional mechanisms such as ethical walls and cones of silence—concepts that were not yet familiar to Canadian courts or legal regulators—and invited the governing bodies of the legal profession to "develop standards for the use of institutional devices" that could provide sufficient guarantees of effective screening.²⁸ Justice Sopinka concluded that these standards would

strike the appropriate balance among the three interests to which I have referred. In giving precedence to the preservation of the confidentiality of information imparted to a solicitor, the confidence of the public in the integrity of the profession and in the administration of justice will be maintained and strengthened. On the other hand, reflecting the interest of a member of the public in retaining counsel of her choice

25. See *ibid* at 1271. Justice Cory held:

Where a lawyer who has had a substantial involvement with a client in an ongoing contentious matter joins another law firm which is acting for an opposing party, there is an irrebuttable presumption that the knowledge of such lawyer, including confidential information disclosed to him or her by the former client, has become the knowledge of the new firm. Such an irrebuttable presumption is essential to preserve public confidence in the administration of justice.

Ibid. The concurring justices would have left for another occasion "whether a lawyer, who has not personally been involved in any way with the client on the matter in issue and who moves to a firm acting for the opponent to the client, should also be irrebuttablely presumed to have received and imparted confidential information to his new firm" (*ibid.*).

26. *Ibid* at 1261, 1262.

27. *Ibid* at 1262.

28. *Ibid.*

and the interest of the profession in permitting lawyers to move from one firm to another, the standards are sufficiently flexible to permit a solicitor to act against a former client provided that a reasonable member of the public who is in possession of the facts would conclude that no unauthorized disclosure of confidential information had occurred or would occur.²⁹

(ii) *Chapters v Davies, Ward & Beck LLP*

In *Martin*, it was easy for the Court to conclude that the lawyer had received confidential information relevant to the matter at hand, because there was no dispute that the junior associate had actively worked on the other side of the very same case.³⁰ The inquiry is not always so straightforward.

In *Chapters Inc v Davies, Ward & Beck LLP*, the Court of Appeal for Ontario clarified that, when it is alleged that a lawyer received relevant confidential information by acting in a *different* matter, the party seeking disqualification bears the onus to present “clear and cogent evidence” that the matters are related³¹—but need not disclose the confidential information sought to be preserved.³² What constitutes clear and cogent evidence depends on the matter; the inquiry is necessarily fact-specific, but “the client must demonstrate that the possibility of relevant confidential information having been acquired is realistic, not just theoretical”.³³

Chapters concerned a law firm that had been retained in 1994 by SmithBooks to act on competition law issues in its acquisition of another bookstore, Coles, and the companies’ amalgamation to form Chapters Inc. In 1998, the same firm was retained by one of Chapters’ competitors to act in a competition matter in which Chapters was adverse in interest. Chapters alleged that the law firm had received confidential information about the company that would be relevant to the present competition matter; the firm argued that there had been fundamental changes in the Canadian retail book industry and in Chapters’ business in the intervening years, such that the new retainer was not sufficiently related to the previous one.

29. *Ibid* at 1263.

30. See *ibid* at 1264.

31. (2001), 52 OR (3d) 566 at para 29, 10 BLR (3d) 104 (CA) [*Chapters*].

32. See *ibid* at paras 28–30; *Moffat v Weststein* (1996), 29 OR (3d) 371 at 400–03, 135 DLR (4th) 298 (Ct J (Gen Div)).

33. *Chapters, supra* note 31 at para 30.

The Court accepted Chapters' position that the matters pertained to similar issues and that the confidential information acquired in the first retainer was relevant despite the passage of time, and disqualified the law firm from acting on the new matter.³⁴ As the firm had not implemented any institutional screening measures, this finding was dispositive of the inquiry.

(iii) *Celanese Canada Inc v Murray Demolition Corp*

The Supreme Court of Canada's 2006 decision in *Celanese Canada Inc v Murray Demolition Corp* concerned law firms that had obtained confidential information belonging to the opposing party not through a former retainer but through errors in the execution of an Anton Piller order (which authorizes one of the parties in litigation to seize documents belonging to the opposing party in order to preserve evidence). The party being searched alleged they were not given sufficient time to review the documents, and as a result privileged documents were seized and produced to counsel to the adverse party.³⁵

The Supreme Court of Canada granted the disqualification motion, applying the test from *Martin*. Although the firms had argued that *Martin* was inapplicable because it never had a solicitor-client relationship with the moving party, the Supreme Court of Canada disagreed, holding:

The relevant elements of the *MacDonald Estate* analysis do not depend on a pre-existing solicitor-client relationship. The gravamen of the problem here is the possession by opposing solicitors of relevant and confidential information attributable to a solicitor-client relationship to which they have no claim of right whatsoever.³⁶

The Supreme Court of Canada in *Celanese* also commented on remedies as follows:

[I]f a remedy short of removing the searching solicitors will cure the problem, it should be considered. . . . [T]he task "is to determine whether the integrity of the justice system, viewed objectively, requires removal of counsel in order to address the violation of privilege, or whether a less drastic

34. See *ibid* at paras 35–36.

35. See *Celanese*, *supra* note 15 at paras 9–11, 14.

36. *Ibid* at para 46.

remedy would be effective”. The right of the plaintiff to continue to be represented by counsel of its choice is an important element of our adversarial system of litigation.³⁷

These remarks were expressly premised, however, on the fact that this was a case of inadvertent disclosure.

(iv) Institutional Measures for Conflict Screening and *Chartis*

Not long after the Supreme Court of Canada’s decision in *Martin*, the governing bodies of the legal profession responded to Sopinka J’s invitation and established standards for screening measures to prevent the disclosure of confidential information when conflicts arose from a transfer between law firms. The Law Society of Upper Canada, to provide one example,³⁸ included the following twelve guidelines in the Commentary to its *Rules of Professional Conduct*:

1. The screened lawyer should have no involvement in the new law firm’s representation of its client.
2. The screened lawyer should not discuss the current matter or any information relating to the representation of the former client (the two may be identical) with anyone else in the new law firm.
3. No member of the new law firm should discuss the current matter or the previous representation with the screened lawyer.
4. The current matter should be discussed only within the limited group that is working on the matter.
5. The files of the current client, including computer files, should be physically segregated from the new law firm’s regular filing system, specifically identified, and accessible only to those lawyers and support staff in the new law firm who are working on the matter or who require access for other specifically identified and approved reasons.

37. *Ibid* at para 56.

38. The Canadian Bar Association had established a task force to consider appropriate screening methods, and the guidelines that resulted were adapted and adopted by the provincial law societies. See Canadian Bar Association, *Conflict of Interest Disqualification: Martin v. Gray and Screening Methods* (Report), by Conflict of Interest Task Force (Ottawa: Canadian Bar Association, February 1993).

6. No member of the new law firm should show the screened lawyer any documents relating to the current representation.
7. The measures taken by the new law firm to screen the transferring lawyer should be stated in a written policy explained to all lawyers and support staff within the firm, supported by an admonition that violation of the policy will result in sanctions, up to and including dismissal.
8. Undertakings should be provided by the appropriate law firm members setting out that they have adhered to and will continue to adhere to all elements of the screen.
9. The former client, or if the former client is represented in that matter by a lawyer, that lawyer, should be advised (a) that the screened lawyer is now with the new law firm, which represents the current client, and (b) of the measures adopted by the new law firm to ensure that there will be no disclosure of confidential information.
10. The screened lawyer's office or work station and that of the lawyer's support staff should be located away from the offices or work stations of lawyers and support staff working on the matter.
11. The screened lawyer should use associates and support staff different from those working on the current matter.
12. In the case of law firms with multiple offices, consideration should be given to referring conduct of the matter to counsel in another office.³⁹

The Law Society described these guidelines as “a checklist of relevant factors to be considered” and noted that “[a]doption of only some of the guidelines may be adequate in some cases, while adoption of them all may not be sufficient in others.”⁴⁰ The Commentary further provided that “[i]t is not possible to offer a set of ‘reasonable measures’ that will be appropriate or adequate in every case.”⁴¹

39. The Law Society of Upper Canada, *Rules of Professional Conduct*, Toronto: Law Society of Upper Canada, 2000, r 2.05(10), commentary, as it appeared on 1 November 2000 [LSUC *Rules*]. This was adapted from the Canadian Bar Association's Task Force report. See Canadian Bar Association, *supra* note 38 at 39–40. These guidelines have since been amended; the current iteration, which is substantially similar, can be found in the Law Society of Ontario's *Rules of Professional Conduct*. See Law Society of Ontario, *Rules of Professional Conduct*, Toronto: Law Society of Ontario, 2019, r 3.4-20, commentary [3].

40. LSUC *Rules*, *supra* note 39, r 2.05(10), commentary.

41. *Ibid.*

Despite these qualifications, it became generally accepted in the profession that transferring lawyer conflicts could be addressed through the timely implementation of screening measures that satisfied the law societies' guidelines. As will be detailed in the study findings below, between 1990 and 2016, no Canadian court disqualified a law firm that had implemented guideline-compliant screening measures in a timely manner.

In 2016 and 2017, however, *Ontario v Chartis Insurance Company of Canada* put these guidelines to the test. The underlying action in *Chartis* was a complex insurance coverage dispute between the Ontario government, represented by Theall Group LLP, and various insurance companies, including AIG, which was represented by Lloyd Burns McInnis LLP (LBM). Michael Foulds, a mid-career lawyer, had been on the legal team at Theall representing Ontario. Douglas McInnis, a senior LBM partner acting for AIG in the matter, had acted as counsel to AIG for about thirty years. Foulds and McInnis had previously worked together at another law firm, and in 2013 McInnis invited Foulds to join LBM as a partner.⁴²

LBM identified the potential conflict and implemented an ethical screen. McInnis contacted Theall about a month before Foulds was to start work at LBM to detail these screening measures, which not only satisfied all Law Society guidelines but imposed additional safeguards. McInnis asked for Ontario's consent to LBM continuing to act for AIG in the coverage action, but Theall did not provide a substantive response at that time.⁴³

Foulds began work at LBM in January 2014. About a month later, Theall objected to LBM continuing to act on the coverage dispute because Foulds had been privy to Ontario's confidential information and litigation strategy.⁴⁴

Initially, the motions judge dismissed the motion to disqualify LBM. He accepted that there continued to be professional contact between Foulds and McInnis in other matters (LBM's evidence on the motion was that Foulds spent about fifty to sixty per cent of his time at LBM working with McInnis on other insurance coverage matters, including for AIG),⁴⁵ but held that "the absolute prevention of inadvertent disclosure can never be assured. Inadvertent disclosure could occur in even the most structured of professional environments. The issue is whether reasonable precautions have been taken to minimize the risk."⁴⁶ The motions judge held that nothing more could be done by LBM to protect the confidentiality of Ontario's information, concluding:

42. See *Chartis CA*, *supra* note 10 at paras 9–15.

43. See *ibid* at paras 16–19.

44. See *ibid* at para 20.

45. See *ibid* at para 19.

46. *Her Majesty the Queen v Chartis Insurance Company of Canada*, 2014 ONSC 4221 at para 40.

In considering the timely and comprehensive compliance by LBM with the institutional measures set out in the [Law Society] guidelines . . . I find that a reasonably informed person would be satisfied that the use of confidential information had not occurred or would likely occur, and it is in the interests of justice to allow Mr. McInnis to remain as AIG's counsel of choice.⁴⁷

The Court of Appeal disagreed with the motions judge and disqualified LBM, holding that while implementation of the screening guidelines is “highly persuasive”, is “a significant factor to consider”, and “typically . . . provides sufficient protection for the migrating lawyer's former client”, it is not determinative.⁴⁸

The Court of Appeal held that the question on such motions is not whether an ethical screen is comprehensive, but whether it is *effective*, concluding:

The objective of the guidelines is to limit or screen interaction. . . . The most striking feature of this case is that Foulds spends 50 to 60 percent of his time working with McInnis. In the face of that fact, it cannot be said that there is clear and convincing evidence that all reasonable measures are being taken to ensure that no disclosure would occur by Foulds to AIG's counsel. The public, represented by the reasonably informed person, could not be satisfied that no use of confidential information would occur between two people with such an intense working relationship.⁴⁹

The Court of Appeal rejected the suggestion that its holding would result in any uncertainty in the law, concluding: “Most cases that are guideline compliant will be unobjectionable. However, this case is most unusual given the intense working relationship between Foulds and McInnis.”⁵⁰

47. *Ibid* at para 44.

48. *Chartis CA, supra* note 10 at para 48. The Ontario government first appealed to the Divisional Court, who reversed the motions judge's decision. See *Ontario v Chartis Insurance Company of Canada*, 2016 ONSC 43 (Div Ct). AIG appealed this decision to the Court of Appeal for Ontario, which rendered the final decision in the matter. See *Chartis CA, supra* note 10. Leave was not sought to the Supreme Court of Canada.

49. *Chartis CA, supra* note 10 at para 68.

50. *Ibid* at para 72.

B. Current Clients and the Duty of Loyalty

(i) *R v Neil*

Although the Supreme Court of Canada provided a framework for analyzing a “classic conflict issue”⁵¹ in *Martin*, different considerations arise if the lawyer did *not* receive any relevant confidential information that could be used against his client’s interest. The Court had occasion to address this concern in *R v Neil*.⁵²

Neil concerned a paralegal, David Neil, facing five indictments, including a charge that he had fabricated court documents for a divorce and a charge that he had participated in a scheme to defraud Canada Trust along with his business associate, Helen Lambert. A lawyer with whom the accused had a referral relationship, Pubalagan Venkatraman, assisted him in defending against the criminal charges. An associate in the Venkatraman firm was later retained to represent Ms. Lambert on her charges in the Canada Trust matter.⁵³

The accused was convicted by a jury for having fabricated court documents in the divorce matter. On the Canada Trust indictment, the Venkatraman firm belatedly raised a conflict of interest arising from their representation of both the accused and Ms. Lambert, and the judge declared a mistrial. The accused then applied for a stay of proceedings of *all* indictments based on the Venkatraman firm’s conflict. It had come to light that the Venkatraman firm had planned to obtain a deal for Ms. Lambert by which the charges against her would be dropped “in return for Lambert sinking [the appellant]”, Neil, and that a lawyer at the Venkatraman firm had encouraged someone entwined in the divorce matter to report the forgeries in an effort to strengthen Ms. Lambert’s defence in the Canada Trust matter.⁵⁴

Justice Binnie, writing for the Court, emphasized the importance of the duty of loyalty to the integrity of the administration of justice, stating: “Unless a litigant is assured of the undivided loyalty of the lawyer, neither the public nor the litigant will have confidence that the legal system, which may appear to them to be a hostile and hideously complicated environment, is a reliable and trustworthy means of resolving their disputes and controversies.”⁵⁵

51. This phrase was used in *NsC Corp Ltd v ABN Amro Bank Canada*. See (1992), 116 NSR (2d) 97 at para 23, 15 CBR (3d) 301 (SC (TD)). This is the first decision in the study that removed counsel on the basis of a breach of the duty of loyalty apart from any concern for confidential information.

52. See *supra* note 2.

53. See *ibid* at paras 4–8.

54. *Ibid* at para 8.

55. *Ibid* at para 12.

Justice Binnie held that the duty of loyalty owed to current clients is “intertwined with the fiduciary nature of the lawyer-client relationship” and “includes a much broader principle of avoidance of conflicts of interest, in which confidential information may or may not play a role”.⁵⁶ In addition to issues of confidentiality, the duty of loyalty contains three other dimensions:

- i. *the duty to avoid conflicting interests* . . . including the lawyer’s personal interest . . .[.]
- ii. *a duty of commitment to the client’s cause* (sometimes referred to as “zealous representation”) . . . ensuring that a divided loyalty does not cause the lawyer to “soft peddle” his or her defence of a client out of concern for another client . . .; and,
- iii. *a duty of candour* with the client on matters relevant to the retainer.⁵⁷

Reviewing the facts before him, Binnie J observed that the duty of loyalty required the Venkatraman firm to focus on the interests of the accused without being distracted by other interests—such as a mandate acting for Ms. Lambert—and prohibited the firm from acting contrary to the accused’s interests.⁵⁸ He explained that “[l]oyalty includes putting the client’s business ahead of the lawyer’s business.”⁵⁹

The Court in *Neil* enunciated a general rule for avoiding conflicts of interest against current clients, which is now known as the bright line rule:

[A] lawyer may not represent one client whose interests are directly adverse to the immediate interests of another current client — *even if the two mandates are unrelated* — unless both clients consent after receiving full disclosure (and preferably independent legal advice), and the lawyer reasonably believes that he or she is able to represent each client without adversely affecting the other.⁶⁰

In fact, before articulating this rule, Binnie J expressly recognized that it is strict and likely to pose challenges for law firms—but held it is nonetheless necessary:

56. *Ibid* at paras 16–17.

57. *Ibid* at para 19 [emphasis in original].

58. See *ibid* at paras 29–30.

59. *Ibid* at para 24.

60. *Ibid* at para 29 [emphasis in original].

The general prohibition is undoubtedly a major inconvenience to large law partnerships and especially to national firms with their proliferating offices in major centres across Canada. Conflict searches in the firm's records may belatedly turn up files in another office a lawyer may not have been aware of. Indeed, he or she may not even be acquainted with the partner on the other side of the country who is in charge of the file. Conflict search procedures are often inefficient. Nevertheless it is the firm not just the individual lawyer, that owes a fiduciary duty to its clients, and a bright line is required.⁶¹

Justice Binnie noted that there were some exceptions to the bright line rule, where the client's consent may be inferred: governments generally accept that private practitioners who do their work may act against them in unrelated matters, and chartered banks and other "entities that could be described as professional litigants" may also have a broad-minded attitude where matters are unrelated and there is no danger of confidential information being abused.⁶²

Returning to the facts before the Court, Binnie J continued: "It is one thing to demonstrate a breach of loyalty. It is quite another to arrive at an appropriate remedy."⁶³ He observed that such breaches may give rise to disciplinary action if a law society complaint is made, and that in some cases a conflict of interest may support a malpractice action against a lawyer for compensation.⁶⁴

The Supreme Court of Canada dismissed the accused's appeal for a stay of proceedings, holding that while the law firm had undoubtedly breached its professional obligations, the breach contributed little to the accused's predicament; the falsified documents had come to light through an independent police investigation, and the law firm's conflict did not render it an abuse of process for the Crown to seek a conviction at a new trial on the Canada Trust indictment.⁶⁵

The Court added in *obiter dicta* that an accused may challenge a conviction on appeal if their lawyer had a conflict of interest that adversely affected the lawyer's performance on behalf of the appellant, in which case the court may order a new trial on the basis of ineffective assistance of counsel.⁶⁶ This was not

61. *Ibid.*

62. *Ibid* at para 28.

63. *Ibid* at para 36.

64. See *ibid* at para 37.

65. See *ibid* at paras 44–47.

66. See *ibid* at paras 38–39, citing *R v Graff* (1993), 135 AR 235, 80 CCC (3d) 84 (CA); *R v Neil*, *supra* note 2 at paras 38–39, citing *R v Widdifield* (1995), 25 OR (3d) 161, 43 CR (4th) 26 (CA).

applicable in the present case, however, because while the accused had consulted and had a solicitor-client relationship with the Venkatraman firm, the firm did not represent him in the criminal proceedings—ineffectively or otherwise.⁶⁷

(ii) *CN Railway v McKercher*

In the years following the Court’s decision in *Neil*, the proper interpretation of the bright line rule—including the meaning of the apparent “professional litigant” exception—was the subject of some debate.⁶⁸ The Court had the opportunity to provide further clarity about a decade later in *Canadian National Railway Co v McKercher LLP*.⁶⁹

McKercher LLP was a large law firm in Saskatchewan that had acted for CN since 1999. In late 2008, McKercher had four open matters for CN: a real estate purchase, a personal injury claim, a receivership, and a power of attorney for service. At that time, McKercher accepted a retainer to act against CN in a proposed class action claiming \$1.75 billion in damages, including punitive damages, on the basis that CN had overcharged farmers for grain transportation. CN learned of the class action when it was served with a statement of claim in January 2009. Around the same time, McKercher ended the four open retainers with CN.⁷⁰

CN applied to remove McKercher as the lawyer of record for Gordon Wallace, the representative plaintiff in the class action, on the basis that McKercher had breached its duty of loyalty to CN and had crossed the bright line by improperly terminating the then-current CN retainers.⁷¹

The Court of Queen’s Bench for Saskatchewan granted CN’s application at first instance, but the Court of Appeal reversed this decision, holding that it was reasonable for McKercher to infer that it had CN’s consent to act against it in an unrelated matter because CN was a professional litigant in the manner contemplated in *Neil*.⁷² While the Court of Appeal accepted that McKercher

67. See *R v Neil*, *supra* note 2 at paras 40–41.

68. See MacKenzie, “Not-So-Bright Line Rule”, *supra* note 7 at 428–29.

69. See *supra* note 5.

70. See *ibid* at paras 1–5. More specifically, on three of the matters the McKercher partners delivered a notice of withdrawal, but on the real estate matter the responsible partner asked CN whether it wanted McKercher to continue to act on the matter and CN directed that the file be transferred to another firm. See *Wallace v Canadian Pacific Railway*, 2011 SKCA 108 at paras 12–17 [Wallace], *rev’d McKercher*, *supra* note 5.

71. See *McKercher*, *supra* note 5 at para 5.

72. See *Wallace*, *supra* note 70 at paras 90–95.

had breached its duty of loyalty by “dumping” CN as a client and failing to be candid with CN about the class action retainer, it concluded that disqualification was not an appropriate remedy for this breach.⁷³ As the underlying matter was of a complex nature generally undertaken by large firms, the Court of Appeal noted that disqualification would not only deprive Wallace of his choice of counsel but could also make it difficult for him to secure new counsel, as CN had retained all three of the largest firms in Saskatchewan.⁷⁴

The Supreme Court of Canada allowed CN’s appeal, concluding that the facts “fell squarely within the scope of the bright line rule” and that “it was reasonable in the circumstances for CN to expect that McKercher would not concurrently represent a party suing it for \$1.75 billion”.⁷⁵ The Supreme Court of Canada declined, however, to make any order as to remedy, instead remitting the matter to the Court of Queen’s Bench for Saskatchewan for redetermination.⁷⁶ The Court thus clarified the scope of the bright line rule, but stopped short of providing useful guidance as to when counsel will actually be disqualified for a breach of the duty of loyalty, and when or whether other remedies will be appropriate.

Writing for a unanimous Court, McLachlin CJ held that the bright line rule applies only “where the *immediate legal* interests of clients are *directly* adverse”, confirming that it does not prevent concurrent representation of clients who are business competitors.⁷⁷ The Court further held that the rule will “not apply in circumstances where it is unreasonable to expect that the lawyer will not concurrently represent adverse parties in unrelated legal matters”.⁷⁸ This cleared up some confusion that persisted following *Neil*—there is not an exception, per se, for professional litigants, but lawyers may infer consent where it would be unreasonable for institutional parties such as governments to expect that a law firm would owe it exclusive loyalty and would not concurrently represent an adverse party in an unrelated matter.⁷⁹ The Court also held that the bright line rule would not apply to condone tactical abuses; it would not be fair if a large institutional client could retain a significant number of law firms and thereby disqualify all other lawyers in those firms from acting for their opponent.⁸⁰

73. See *ibid* at paras 108, 116.

74. See *ibid* at para 113.

75. *McKercher*, *supra* note 5 at para 9.

76. See *ibid* at para 11.

77. *Ibid* at para 32 [emphasis in original]. See also *ibid* at para 35.

78. *Ibid* at para 32.

79. See *ibid* at para 37, citing *R v Neil*, *supra* note 2 at para 28.

80. See *McKercher*, *supra* note 5 at para 36.

The Court concluded that it was reasonable in the circumstances for CN to expect that McKercher would not act for Wallace against it, and that CN was not acting “merely for tactical reasons” because there was no evidence “that CN has been purposefully spreading out its legal work across Saskatchewan law firms in an attempt to prevent Wallace or other litigants from retaining effective legal counsel”.⁸¹

These findings suggest that only in very narrow circumstances will it be unreasonable for a client to expect that a law firm will not act against it. The evidence before the courts below showed that CN, one of the largest corporations in Canada, retained the services of fifty to sixty law firms across the country, including at least two other large firms in Saskatchewan, on about six hundred matters.⁸² The Court’s conclusion that it was reasonable for CN to expect exclusive loyalty from McKercher invited the question: in what circumstances would it be *unreasonable* for a client to expect loyalty from a law firm?⁸³

Moreover, the Court’s finding that CN was not acting “merely for tactical reasons” because there was no evidence “that CN has been *purposefully* spreading out its legal work across Saskatchewan law firms in an attempt to prevent Wallace or other litigants from retaining effective legal counsel” appeared to set a very high threshold for finding a disqualification motion was tactical.⁸⁴ One wondered what sort of evidence would be sufficient—surely, it is all but impossible to demonstrate that an opposing party retained numerous law firms for the purpose of thwarting disqualification motions, when that party can undoubtedly provide various legitimate reasons for their choice of counsel.

Having concluded that McKercher crossed the bright line, the Supreme Court of Canada turned to a discussion of the appropriate remedy. It held that there are three purposes for which it may be necessary for a court to order disqualification: “(1) [T]o avoid the risk of improper use of confidential information; (2) to avoid the risk of impaired representation [due to divided loyalties]; and/or (3) to maintain the repute of the administration of justice”.⁸⁵

The Supreme Court of Canada explained that disqualification is generally the only appropriate remedy to prevent the use of confidential information, as set out in *Martin*, and that disqualification will normally be required to prevent

81. *Ibid* at para 51.

82. See *Wallace*, *supra* note 70 at paras 5–6.

83. Although this does not go directly to the question of whether counsel owes a client exclusive loyalty, it was apparently important to the Court’s conclusion that the class action sought substantial damages from CN, including for punitive damages, which “connote a degree of moral turpitude”—the Court held it was reasonable for CN to feel surprised and dismayed when it learned McKercher had sued it. See *McKercher*, *supra* note 5 at para 52.

84. *Ibid* at para 51 [emphasis added].

85. *Ibid* at para 61.

impaired representation if a law firm is concurrently acting for two clients adverse in legal interest.⁸⁶ In situations falling in neither of these categories—as was the case in *McKercher*—“[d]isqualification *may* be required to send a message that [counsel’s] conduct . . . is not condoned by the courts”, to protect the public’s confidence in the administration of justice, and to deter other lawyers from similar practices.⁸⁷

The Court held that in assessing whether disqualification is warranted on the ground of protecting the integrity of the administration of justice, courts should consider: “(i) [B]ehaviour disentitling the complaining party [from disqualification], such as delay . . . ; (ii) significant prejudice to the new client’s interest in retaining its counsel of choice . . . ; and (iii) the fact that the law firm accepted the conflicting retainer in good faith”.⁸⁸ The Court declined, however, to make any determination on remedy in the case before it. Its conclusion was as follows:

[A] violation of the bright line rule on its face supports disqualification, even where the lawyer-client relationship has been terminated as a result of the breach. However, it is also necessary to weigh the factors identified above, which may suggest disqualification is inappropriate in the circumstances. The motion judge did not have the benefit of these reasons . . . Fairness suggests that the issue of remedy should be remitted to the court for consideration in accordance with them.⁸⁹

There is no obvious reason why the Supreme Court of Canada could not have applied the factors it articulated to the record before it, or why the motions judge would have been in a better position to do so. One might suspect that the nine justices of the Supreme Court of Canada did not agree as to the appropriate remedy on the facts of this case, and preferred to deliver unanimous reasons as to the framework without a remedy than to grant a remedy with dissent. Either way, we are left without guidance as to how the remedial considerations articulated by the Court should apply to a borderline case such as *McKercher*. The motion never returned to the motions judge—McKercher ceased acting for Wallace shortly thereafter.⁹⁰

86. See *ibid* at para 62.

87. *Ibid* at para 63 [emphasis added].

88. *Ibid* at para 65.

89. *Ibid* at para 67.

90. See Cotter & Devlin, *supra* note 9 at 143, n 98.

II. Purpose and Methodology of Empirical Review

A. Goals of Study

Although motions for the disqualification of counsel are not uncommon—especially in litigious matters—the result can be difficult to predict. To date, there has been no evaluation of their prevalence, nor of their outcomes; when clients raise concerns that an opposing lawyer is acting in a conflict of interest, their lawyers can provide only their best guess as to whether it is advisable to bring a motion to disqualify counsel.

Of course, given the general scarcity of data about judicial decision making and outcomes in Canada, the lack of empirical evidence upon which to make litigation decisions is a problem that is not limited to disqualification motions. But the disqualification context is worthy of particular attention. Clients who raise concerns about their former lawyer's apparent conflict already have reason to feel disheartened about the legal system and the integrity of the legal profession. If they cannot obtain sufficient, informed guidance as to whether bringing a disqualification motion is likely to achieve their desired outcome (i.e., meaningfully address their fears that their confidential information will be disclosed or impose consequences for a lawyer's breach of duties), their confidence in the administration of justice will only be diminished further. Disqualification motions and conflicts of interest are areas of the law in which clarity and predictability is especially important to maintaining public confidence in the legal profession.

This paper seeks to provide empirical evidence to support litigants' and lawyers' decision making in respect to conflicts of interest and disqualification of counsel. Specifically, it seeks to address the following questions:

- i. How often are motions to disqualify counsel successful at removing counsel from continuing to act?
- ii. How often will the courts find a conflict of interest exists, but nevertheless decline to remove counsel from continuing to act?
- iii. On what bases do the courts most commonly disqualify counsel?
- iv. How are the courts actually assessing law firms' conflict screens when considering the rebuttable presumption that lawyers who work together share confidences? Will courts find a screen is sufficient to rebut the presumption even if it does not meet all law society guidelines?
- v. Is the decision in *Chartis* an anomaly? Put another way, are there other cases in which a court has found a screen meets all law society guidelines but nevertheless disqualifies counsel from continuing to act?
- vi. How often, and in what circumstances, will the courts find that a disqualification motion was brought for tactical reasons?

Overall, this paper seeks to obtain and review the evidence from nearly thirty years of case law on disqualification motions to provide lawyers and litigants with a more thorough understanding of when and for what reasons the courts will remove a party's counsel of choice from the record.

B. Methodology

(i) Source of Data (Judgments)

To conduct a comprehensive review of disqualification cases, I sought to collect all reported⁹¹ decisions rendered on disqualification motions since the Supreme Court of Canada rendered its reasons in *Martin*. As the language used to describe motions for the removal of opposing counsel varies, and as Canadian courts do not consistently track the basis for motions brought before them, I determined the most thorough way to assemble the primary data was to assemble all cases published on CanLII that cited one or more of *Martin*, *Neil*, or *McKercher*, up to the end of 2018. 1,884 cases met these parameters.

The initial dataset was over-inclusive, however, as it captured numerous cases that cited the leading Supreme Court of Canada decisions on disqualification but were not themselves disqualification motions. These included solicitors' negligence cases, professional discipline matters, and other decisions discussing professional responsibility, fiduciary obligations, and conflict of interest principles more generally. These cases were excluded from the dataset and not analyzed further, leaving 1,399 disqualification decisions.

(ii) Method of Sorting and Coding Judgments

Each of the 1,399 disqualification motion decisions in the dataset were coded for the following variables:⁹²

91. "Reported" refers to decisions publicly available through CanLII, and is not limited to cases published in law reports. The limits of the dataset are discussed in Part II.B(iii), *below*.

92. The data was first reviewed by a software program developed for the purpose of this research to gather various easily-identifiable data points (i.e., those which appear in each judgment in the same format and location): case name; decision date; language; province of origin; and leading decision(s) cited. It also noted the case citation and kept a link to each decision, then inputted this data into an Excel spreadsheet. Review and coding for all "disqualification data", as well as subject matter and appeal information, was done manually by the author and her research assistants.

Case Information:

- (1) Case name
- (2) Decision date
- (3) Language
- (4) Province of origin
- (5) Leading decision(s) cited (*Martin, Neil, McKercher*)
- (6) Subject matter⁹³
- (7) Appeal information⁹⁴

Disqualification Data:

- (1) Was a conflict of interest identified?
- (2) Remedy ordered⁹⁵
- (3) Basis for disqualification asserted⁹⁶
- (4) Basis found for disqualification⁹⁷
- (5) Findings about conflict screens⁹⁸

93. Coded into the following categories: (1) Criminal law; (2) Family law; (3) Civil/Commercial litigation; (4) Transactional; (5) Public/Administrative law; (6) IP; (7) Tax; (8) Employment/Labour; (9) Aboriginal/Indigenous law; (10) Wills and Estates; and (11) Bankruptcy.

94. See note 101 and the accompanying text.

95. Coded as follows: N/A (no conflict found); (1) Disqualified counsel; and (2) Other/No remedy (cases in category 2 were in turn coded as: (a) Conditions imposed on continued representation; (b) Stay of proceedings; and (c) Other/No remedy).

96. Coded as follows: (1) Confidential info; (2) Duty of loyalty breach; (3) Both confidentiality and loyalty; (4) Lawyer a witness; and (5) Other (cases in category 5 were in turn coded as: (a) Unprofessional conduct; (b) Other conflict of interest (i.e., acting for multiple parties); and (c) Appearance of integrity of the administration of justice).

97. Coded as follows: (1) Confidential info; (2) Duty of loyalty breach; (3) Both confidentiality and loyalty; (4) Lawyer a witness; and (5) Other (cases in category 5 were in turn coded as: (a) Unprofessional conduct; (b) Other conflict of interest (i.e., acting for multiple parties); and (c) Appearance of integrity of the administration of justice).

98. Cases in which the assertion of conflict was based on confidentiality issues were coded as follows: (1) All screening guidelines implemented in a timely manner, sufficient; (2) Late implementation of screening guidelines, insufficient; (3) Incomplete screen, insufficient; (4) Incomplete screen, but sufficient; (5) Late implementation of all screening guidelines, but sufficient; (6) All screening guidelines implemented in a timely manner, but insufficient; and (7) No screen or screen not discussed although confidentiality issue raised. Cases were reviewed in two tranches, with the first tranche composed of all English-language cases from 1990 to 2017 (review completed in 2018) and the second tranche composed of all French-language cases from 1990 to 2018 as well as English-language cases from 2018 (review completed in 2019). In the first tranche, cases were also coded based on the size of the law firm at issue, noting the number of lawyers as well as the number of offices. This approach was abandoned in

- (6) Findings about whether client had a reasonable expectation of loyalty⁹⁹
- (7) Findings about whether the motion was tactical¹⁰⁰

The coding relating to appeals was used to ensure each case was only counted once. Motions for leave to appeal were excluded from the dataset, and all substantive decisions of appellate courts were coded to indicate whether the appeal was granted, partially granted, or dismissed. We then located in the dataset the decision(s) that formed the basis of the appeal, and coded it to identify whether it had been reversed or affirmed. When analyzing the data, only one decision reflecting the ultimate result of the removal motion was considered.¹⁰¹

(iii) Comprehensiveness of the Dataset

As has been the case in other Canadian case law-based empirical research,¹⁰² the process of reviewing appellate decisions revealed that about one-third of

the second tranche because too few decisions made any findings in this regard for the data to support any meaningful conclusions.

99. Cases in which the assertion of conflict was based on loyalty issues were coded as follows: (1) Yes, client had a reasonable expectation of loyalty; (2) Yes, despite allegation they were a “professional litigant”; (3) No, because they were a “professional litigant”; (4) No, because the client consented; (5) No, because it was not reasonable for the client to object; and (6) No (other basis). Ultimately the number of cases in which findings were made on this point were too small of a sample to draw any meaningful conclusions about the role of this factor in determining disqualification motions.

100. Coded as follows: (1) No, motion was not tactical; (2) Yes, motion was tactical; and (3) As a result of delay, the client waived the right to allege a disqualifying conflict.

101. Cases that were subject to an appeal were coded as follows: (1) Appeal granted; (2) Appeal dismissed; (3) Appeal partially granted; (4) Appealed and reversed; (5) Appealed but affirmed; (6) Appealed, partially granted; (7) Leave motion; (8) Appeal dismissed, but underlying decision not reported; and (9) Appeal granted, but underlying decision not reported. When analyzing the data, I filtered out decisions coded as: (2) Appeal dismissed; (4) Appealed and reversed; (6) Appealed, partially granted; and (7) Leave motion. In the small number of disqualification cases that proceeded through multiple levels of appeal, the decisions of intermediate appellate courts were also excluded for the purpose of analysis so the decision would be counted only once. See e.g. *Celanese*, *supra* note 15, rev’g (2004), 73 OR (3d) 64, 244 DLR (4th) 33 (CA), aff’g (2004), 69 OR (3d) 632, 237 DLR (4th) 516 (Div Ct), rev’g (2003), 69 OR (3d) 618, 2003 CanLII 6649 (Sup Ct).

102. See Brooke MacKenzie, “Effecting a Culture Shift—An Empirical Review of Ontario’s Summary Judgment Reforms” (2017) 54:4 *Osgoode Hall LJ* 1275 at 1292 [MacKenzie, “Effecting a Culture Shift”].

the appeals were from unreported decisions.¹⁰³ This raises the question of how many disqualification motion decisions were not (or could not be) in the dataset because they were not reported.

It is unfortunately not possible or practicable to determine what decisions and how many decisions go unreported in all levels of court across Canada. Although a rough measure, the data pertaining to appeals from unreported decisions in this study and in a 2017 Ontario-based empirical review of summary judgment motion decisions¹⁰⁴ suggests that the proportion of unreported motion decisions could be in excess of one-third.

Unless and until all Canadian courts publish all their decisions, a truly comprehensive empirical review of motion outcomes and reasoning is not possible. The dataset assembled for this study thus necessarily represents a substantial representative sample of all Canadian disqualification decisions since *Martin*, and is as comprehensive as reasonably possible.

III. Findings

In this part, we will review how the data gathered answers our research questions. Further analysis and discussion of this data follows in Part IV.

A. Motions Asserting a Conflict of Interest

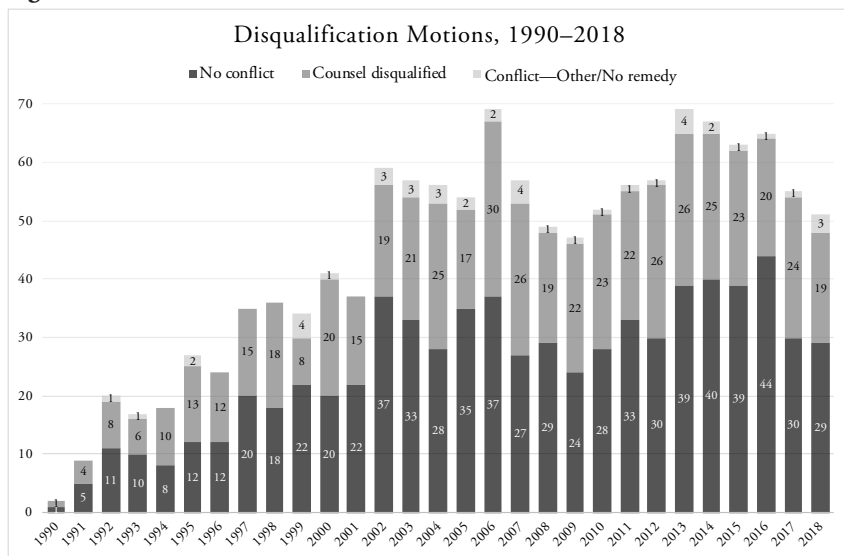
A total of 1,283 motions for the disqualification of counsel were heard from 1990 to 2018.¹⁰⁵ The number of disqualification motions rose steadily in the ten years following *Martin* in 1990, and there was a noticeable increase in motions asserted following the Supreme Court of Canada's decision in *Neil* in 2002 (at which time it became clear that counsel could be removed from acting even if confidential information was not at issue, where they have breached their duty of loyalty). Since 2002, the number of reported disqualification decisions has fairly consistently remained between fifty to seventy motions across Canada each year.

103. Of 163 appellate decisions in this dataset, 56 (or 34%) could not be matched with a reported decision (whether in the dataset, or on CanLII or LexisNexis Quicklaw).

104. See MacKenzie, "Effecting a Culture Shift", *supra* note 102 at 1292.

105. Although, as noted above, there were 1,399 decisions in the dataset, this number was reduced to 1,283 once dismissed appeals and decisions reversed on appeal were filtered out. See *supra* note 101 and accompanying text.

Figure 1



Number of reported disqualification motions decided in Canada (1990–2018), by year decision was rendered and outcome of motion.

Of the 1,283 reported disqualification motions, 750 were asserted on the basis that counsel had obtained relevant confidential information that could be used to prejudice the opposing party (relying on the principles and test articulated in *Martin*), and a further 249 asserted both confidentiality concerns and a conflict arising from a breach of the duty of loyalty. As a result, in total, 79% of disqualification motions relied on an alleged risk of disclosure of confidential information as a basis to remove opposing counsel from the record.

Just 156 of the 1,283 motions, or 12%, relied on a breach of the duty of loyalty as the sole basis for removal of counsel, based on the principles laid out in *Neil and McKercher*.

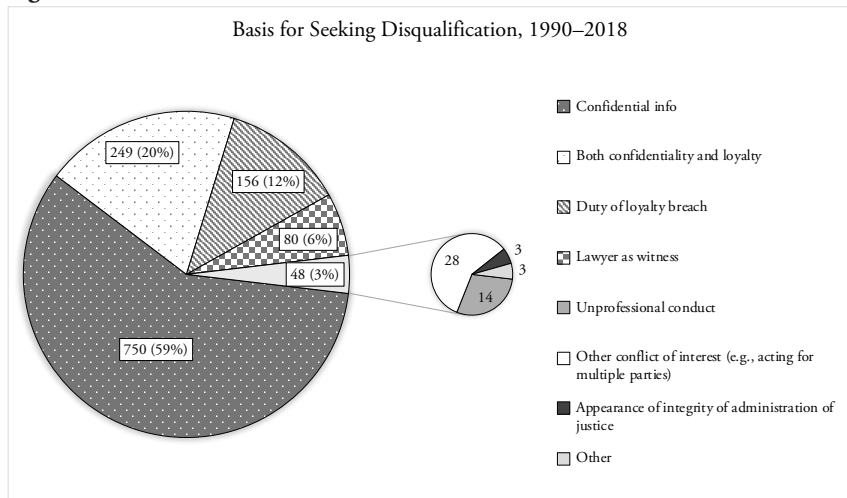
A further 80 motions were premised not on confidentiality or loyalty concerns but sought to disqualify counsel from acting because they were required to give evidence on the matter. Such motions are based not only in common law principles but also in lawyers’ professional conduct rules; the Federation of Law Societies of Canada’s *Model Code of Professional Conduct* provides that “[a] lawyer who appears as advocate must not testify or submit his or her own affidavit evidence before the tribunal . . . unless the matter is purely formal or uncontroverted”.¹⁰⁶

106. Federation of Law Societies of Canada, *Model Code of Professional Conduct*, Ottawa:

Three per cent of disqualification motions during the study period (48 cases) relied on none of these established grounds, but asserted broader concerns about conflicts of interest, unprofessional conduct, or that permitting the lawyer to continue to act would harm public confidence in the integrity of the profession and the administration of justice. As we will see below, such motions were markedly less likely to result in removal than those asserting confidentiality or loyalty concerns.

Figure 2 illustrates the breakdown of disqualification motions by the basis on which the moving party asserted disqualification ought to be ordered.

Figure 2



Number and proportion of disqualification motions by the basis on which the moving party sought removal of counsel (1990–2018).

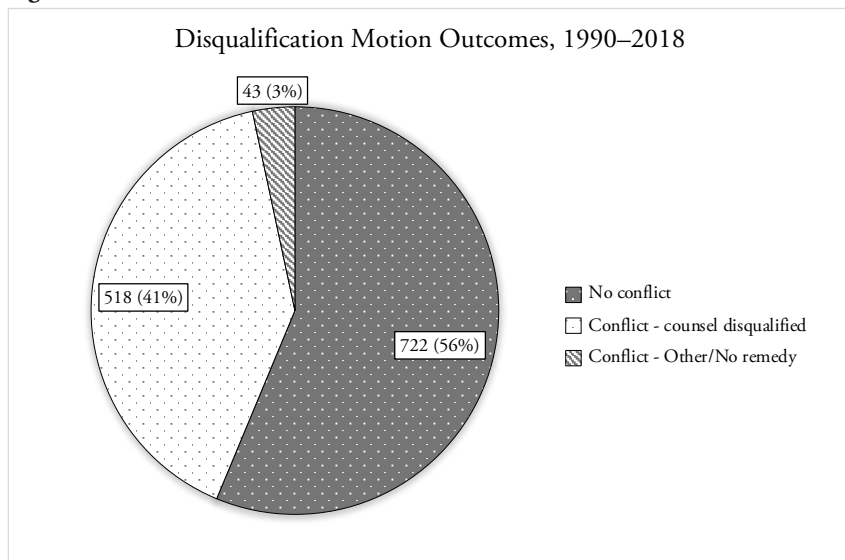
Federation of Law Societies of Canada, 2014, s 5.2-1. The commentary to that rule provides “[t]he lawyer who is a necessary witness should testify and entrust the conduct of the case to another lawyer”. See *ibid*, s 5.2-1, commentary 1. This rule has been implemented in all provinces and territories across Canada. Although the *Model Code* did not come into effect until 2014, provincial law societies’ own conduct rules imposed similar duties before its enactment and implementation into provincial codes. See e.g. *LSUC Rules*, *supra* note 39, r 4.02.

B. Conflict Findings and Remedies Ordered

(i) Overview

In 56% of cases, the court found that the counsel sought to be removed was not in a conflict of interest and dismissed the motion. Counsel was disqualified in 41% of motions, and in 3% the court found that there was a conflict but ordered an alternative remedy (or no remedy at all).

Figure 3



Motions for the disqualification of counsel by disposition (1990–2018).

The proportion of motions in which disqualification was ordered has not varied widely year-over-year in the twenty-eight years since *Martin*,¹⁰⁷ nor does it vary widely depending on the basis upon which disqualification is sought.

107. See Figure 1. In most years the proportion of motions granted has fallen between 35–45%, and it exceeded 50% in just one year (1994).

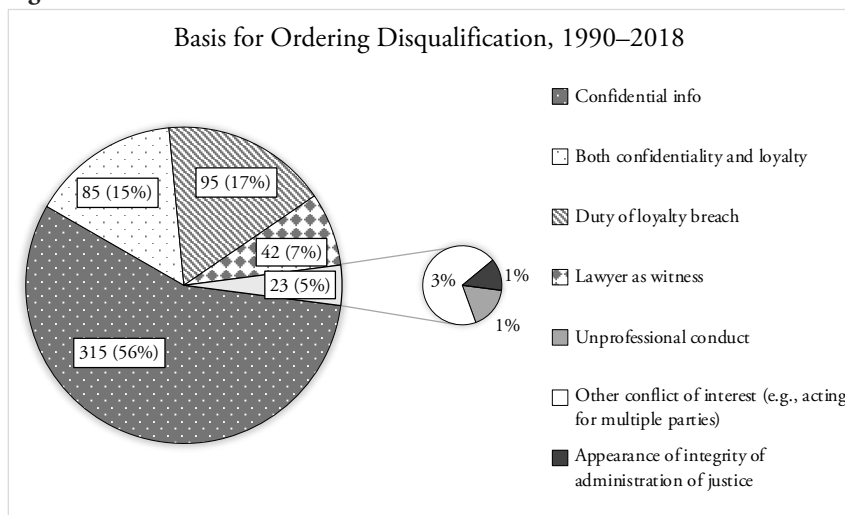
Table 1

Basis	Number Asserted	Number Granted	Percentage Granted
Confidential info	750	303	40%
Duty of loyalty breach	156	60	38%
Both confidentiality and loyalty	249	102	41%
Lawyer as witness	80	40	50%
Other	48	13	27%
Total	1,283	518	40%

Number and proportion of disqualification motions granted by basis upon which disqualification was sought (1990–2018).

Nearly three-quarters of orders for the removal of counsel are based on the risk of misuse of confidential information—56% of disqualification orders were premised on confidentiality issues alone, and in a further 15% the court found that both a concern for the disclosure of confidential information and a breach of counsel’s duty of loyalty formed a basis to order removal. 17% of orders for the removal of counsel are premised solely on a breach of the duty of loyalty, and a further 7% of such orders are made because the lawyer must give evidence in the proceeding (in which case continuing to act would violate their professional conduct obligations).

Figure 4



Breakdown of the basis upon which disqualification of counsel was ordered (1990–2018).

(ii) Removal Without Confidentiality or Loyalty Concerns

In a small number of cases, counsel has been disqualified from continuing to act despite there being no risk of disclosure of confidential information, no breach of the duty of loyalty, and no concern that they will have to give evidence in the proceeding. Most of those cases (sixteen of twenty-three) result from conflicts of interest that are unrelated to confidential information—such as a lawyer having a personal relationship with a party or witness, or a lawyer acting for multiple parties in the proceeding whose interests are not aligned. But a handful of such cases warrant special attention, because they ground disqualification in concerns for public confidence in the integrity of the legal profession and the administration of justice.

In four cases, courts or tribunals removed counsel as a result of findings of unprofessional conduct, including two matters in which the lawyer met with the adverse party personally without the presence or knowledge of the adverse party's counsel,¹⁰⁸ and another in which the lawyer

108. See *Malkov v Stovichek-Malkov*, 2015 ONSC 4836 at para 31; *Everingham v Ontario* (1991), 84 DLR (4th) 354, 1991 CanLII 8322 (Ont Ct J (Gen Div)), aff'd in part (1992), 8 OR (3d) 121, 88 DLR (4th) 755 (Div Ct).

was disrespectful to the tribunal, chronically late to hearing days, and refused to follow tribunal directions, causing delay and unduly impeding the progress of the hearing.¹⁰⁹

There were three cases in which a court or tribunal ordered disqualification based on an independent concern for public confidence in the integrity of the administration of justice (that is, untethered to any concern for protecting client confidences or the duty of loyalty, and absent any basis to suggest the lawyer had acted contrary to their professional conduct rules). Each case was idiosyncratic, and one was overturned on appeal.

In one motion that came before the Ontario Superior Court of Justice not long after *Martin*, the Court expressed concern that a firm that launched five overlapping actions the day after a related injunction was denied was seeking to subvert the injunction decision and pre-empt the opposing party's rights to a power of sale. The Court held that so doing "[cast] a pall over the whole series of events" and that permitting the firm to continue to act "would cast a shadow upon the integrity of the administration of justice".¹¹⁰ In another, the Law Society of Upper Canada's hearing tribunal precluded a former Treasurer and ex officio bencher of the Law Society from appearing as counsel for a lawyer in discipline proceedings, based on its concern about the public perception of the former Treasurer's "undue influence" on the hearing panel, which "could serve to erode public confidence in self-regulation".¹¹¹

In the third decision, a Quebec court removed a large national firm from acting pro bono for the defendant in a small claims dispute in which the plaintiff was a former lawyer at the national firm. The plaintiff alleged that the firm had taken on the matter not out of altruism but to retaliate against her following an employment conflict that led to her departure from the firm. Her allegation was not without foundation; the defendant provided no evidence or explanation as to why she had selected that particular large national firm to represent her in the matter. Acknowledging that the firm had no relevant confidential information about the plaintiff, the Court nevertheless disqualified the firm "because the residual conflict of the previous relationship would prevent it from having sufficient distance and objectivity to insure the proper administration of justice", noting that "the present case is an example of a situation where the detriment of the probable impairment of the administration of justice overcomes the interest of the party in choosing this specific firm of attorneys, an interest which is, in the present file, at best, academic".¹¹²

109. See *AM v Michener Institute for Applied Health Sciences*, 2011 HRTO 843 at para 54.

110. *781332 Ontario Inc v Mortgage Insurance Co of Canada* (1991), 5 OR (3d) 248 at 252, 254, 1991 CanLII 7076 (Ct J (Gen Div)).

111. *Law Society of Upper Canada v Polisuk*, 2017 ONLSTH 171 at para 44.

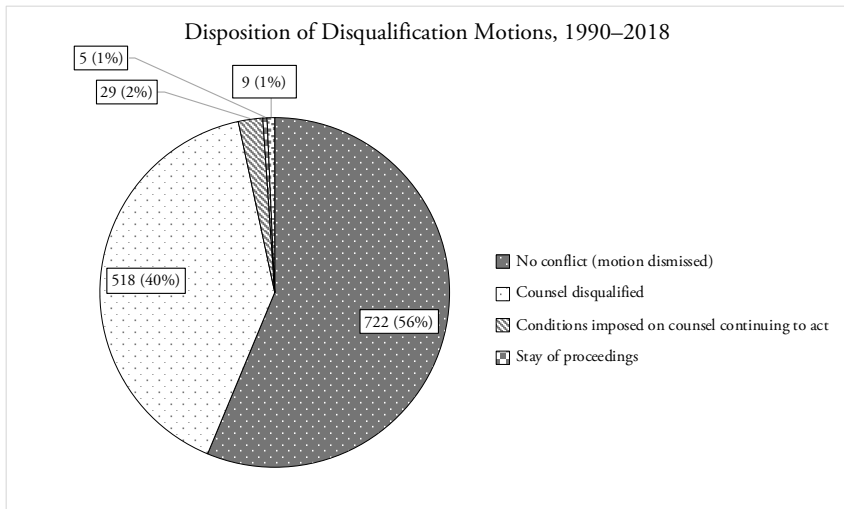
112. *Sanderson v Mangadlao*, 2015 QCCQ 3441 at paras 64, 65.

The Court of Appeal of Quebec reversed this decision, finding that the motion judge had drawn inferences about the law firm that were not available from the evidence, and that he had effectively held that the law firm’s client bore the burden to show that the firm should be permitted to act for her, rather than placing the burden on the opposing party to show that the firm should be removed. Reviewing the matter afresh, the Court of Appeal declined to order disqualification, concluding that there was insufficient evidence to suggest that the residual conflict from the previous relationship would impair the proper administration of justice, and that the circumstances were “not of the gravity and necessity required for a declaration of disqualification”.¹¹³

(iii) Remedies Ordered

The disposition of motions for the disqualification of counsel broke down as follows.

Figure 5

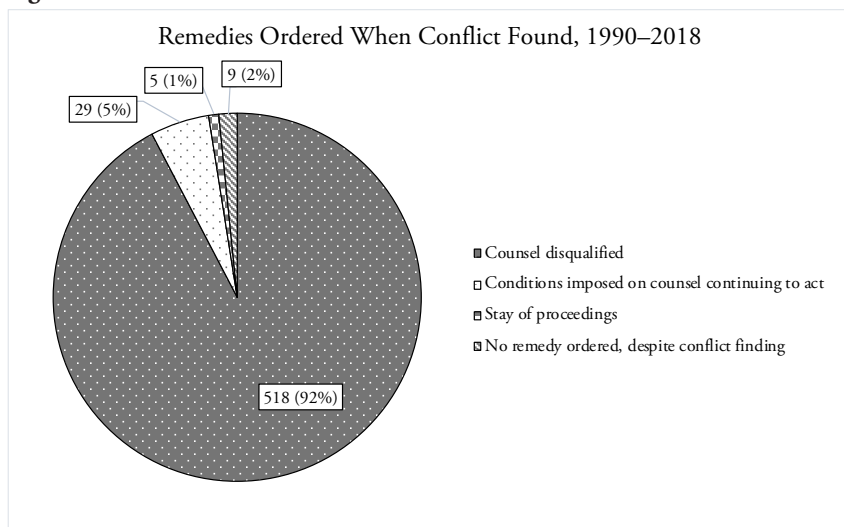


Disposition of disqualification motions (1990–2018).

113. *Sanderson c Mangadlao*, 2016 QCCA 587 at para 42, rev’g *supra* note 112 [translated by author].

When a court finds that the lawyer or law firm of record has a conflict of interest, the usual remedy is disqualification.

Figure 6



Breakdown of remedy ordered in cases where the court finds counsel had a conflict of interest (1990–2018).

The cases in which the court finds the lawyer is in a position of conflict but nevertheless declines to order disqualification are also of particular interest—especially since this category includes two of the leading Supreme Court of Canada decisions, *Neil* and *McKercher*.

Of the forty-three cases in which the court identified a conflict but declined to remove counsel, it imposed conditions on counsel continuing to act in twenty-nine decisions. These cases included matters in which a lawyer had a conflict of interest that did not relate to confidential information—such as a relationship that precluded the lawyer from cross-examining a witness—or when counsel represented multiple parties in an action whose interests had diverged, and the court ordered that independent counsel be retained by one of the parties.

A stay of proceedings was ordered in five cases, including criminal matters in which the Crown inadvertently disclosed confidential information to defence counsel,¹¹⁴ and a civil matter in which the plaintiff company, with its lawyer's

114. See *R v Hirschbaltz*, 2004 SKQB 17; *R v Kreklewich*, 2016 SKQB 223 (in which the primary reason for the stay of proceedings was unreasonable delay, but the Court held

knowledge, obtained the defendants' confidential information by hacking their computer.¹¹⁵

No remedy was ordered despite finding a conflict in nine cases, including *Neil* and *McKercher*, as described above in Part I.B.

In three such cases,¹¹⁶ the lawyer at issue had left the law firm or otherwise withdrawn by the time the motion was decided, so the court found no need to order disqualification. In three others (including *McKercher*),¹¹⁷ the court deferred deciding a remedy until a later stage of the litigation, and the issue was either settled or not reported. In *Neil* and one other decision,¹¹⁸ the court decided that the remedy the party had sought (whether a stay of proceedings or disqualification) was not appropriate in the circumstances, so ordered no remedy at all. Lawyers have also been ordered to pay costs of the motion, even if the court found removal was not necessary.¹¹⁹

C. Confidentiality Issues and Screening Measures

As noted above, about three-quarters of motions for disqualification are brought on the basis of confidentiality issues, and determined according to the

that requiring the accused to retain counsel as a result of the Crown's inadvertent disclosure contributed to the delay).

115. See *Autosurvey Inc v Prevost* (2005), 44 CPR (4th) 274, 2005 CanLII 36255 (Ont Sup Ct).

116. See *R v Baltovich* (2003), 170 OAC 327, 2003 CanLII 57381; *MacDonald v Spears*, 2006 NSSC 31; *Piikani Nation v Kostic*, 2018 ABCA 219.

117. See *Quibell v Quibell*, 2010 SKQB 83; *Droit de la famille — 17621*, 2017 QCCA 528 [Droit]; *McKercher*, *supra* note 5.

118. See *7102763 Canada Inc v 2242869 Ontario Inc*, 2014 ONSC 3819 [7102763 *Canada Inc*].

119. See *Investissements Pliska Inc c Tiramani*, [2004] RRA 1186, 2004 CanLII 35510 (QCCS) [Pliska]. Consider also the recent decision in *Smith v Muir*, in which the Court declined to order removal but held that “a fair-minded and reasonably informed member of the public would be troubled by defence counsel’s conduct” (defence counsel had contacted a plaintiff’s treating physicians directly, without the plaintiff’s or his counsel’s knowledge, and led the physicians to believe they had an obligation to turn over the plaintiff’s private health records—when the physicians had no such obligation, and in fact had a duty to keep the records confidential except to the extent they were properly produced under the court rules). See 2019 ONSC 2431 at para 37. Although the plaintiff was unsuccessful on the removal motion, the Court ordered the defendant to pay \$20,000 in costs because the motion was caused by defence counsel’s inappropriate conduct (*ibid* at paras 39–40).

two questions articulated in *Martin*: “(1) Did the lawyer receive confidential information attributable to a solicitor and client relationship relevant to the matter at hand? [and] (2) Is there a risk that it will be used to the prejudice of the client?”¹²⁰

If in answer to the first question it is shown that the lawyer received confidential information, the court will infer that lawyers in the firm shared the confidences and disqualify the firm from acting unless satisfied, on clear and convincing evidence, that all reasonable measures have been taken to ensure that no disclosure will occur by the “tainted” lawyer to members of the firm who are engaged against the former client.¹²¹ As noted above, in every case before *Chartis* where a law firm had implemented a conflict screen that complied with the law society guidelines established in response to Sopinka J’s invitation in *Martin*, the courts accepted this as clear and convincing evidence that all reasonable measures had been taken to ensure no disclosure would occur. *Chartis* thus created some uncertainty as to when implementing screening measures would be sufficient to defeat the presumption.

A closer look at motions for disqualification based on confidentiality issues reveals that the vast majority of these motions turn on the first prong of *Martin*—whether the lawyer received confidential information relevant to the matter at hand—rather than whether any screening measures are adequate to address the risk that disclosure will occur.

In 58% of cases in which counsel was disqualified, there were either no screening measures implemented, or there was no discussion of the screen in the decision. In 35%, the courts found that the screening measures put in place were incomplete (i.e., not compliant with law society guidelines), and in a further 6% the screen would have been adequate but it was not set up in a timely manner (meaning there was a period of time in which there were no safeguards against the disclosure of confidential information in place).

In just two cases (less than 1%) did the courts find that the screening measures were comprehensive and timely but nevertheless inadequate to rebut the presumption that lawyers working together share confidences. The first was *Chartis*. The second was a more recent decision in which the Ontario Superior Court of Justice was similarly concerned that a reasonably informed member of the public would not be satisfied that no confidential information would be shared, even with an ethical wall in place, because of the “close working relationships” between the screened individual and the lawyer on the matter at issue.¹²²

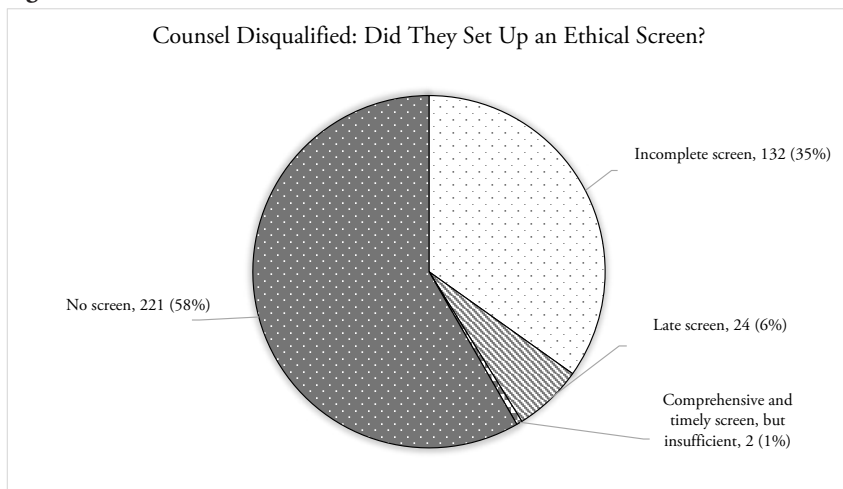
120. *Supra* note 1 at 1260.

121. See *ibid* at 1262.

122. *Laframboise c Lepage*, 2018 ONCS 22 at para 36 [translated by author].

Figure 7 illustrates the courts' findings regarding screening measures in cases in which counsel was disqualified on confidentiality grounds.

Figure 7



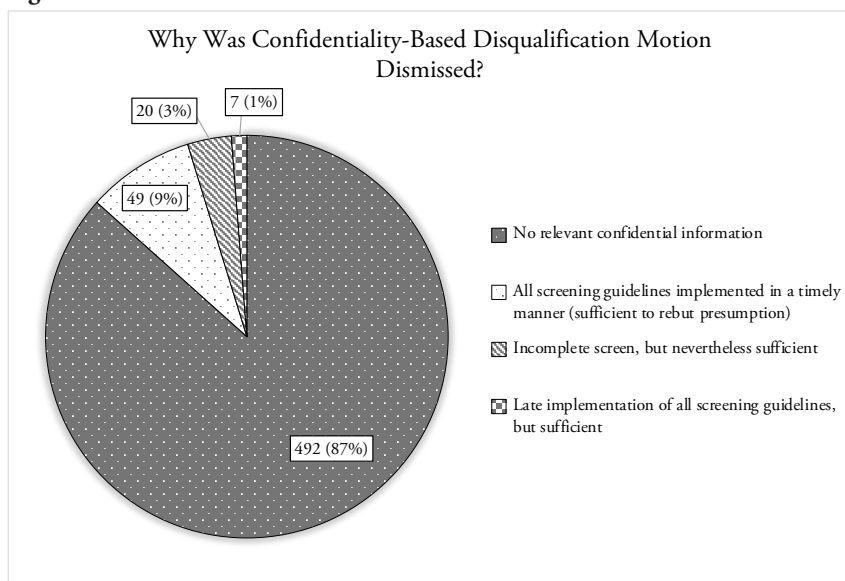
Canadian courts' findings relating to law firm screening measures in cases in which counsel is disqualified on the basis that they received relevant confidential information from the opposing party (1990–2018).

The vast majority of unsuccessful removal motions brought on confidentiality grounds are dismissed because the court concludes that the impugned counsel did not receive any relevant confidential information—whether because the firm simply did not receive any confidential information at all, or because any previous matter on which the firm acted was not sufficiently related to the retainer at issue.

Only 9% of unsuccessful removal motions were defeated on the basis of effective screening measures (i.e., the court inferred that the law firm had relevant confidential information but held the firm had implemented a comprehensive and guideline-compliant conflict screen in a timely way).

Interestingly, twenty disqualification motions (3%) were dismissed because the courts found that an *incomplete* screen was nevertheless sufficient to satisfy the public that there was no risk of disclosure of the confidential information, and in a further seven cases courts found that screening measures that were not implemented in a timely manner were nevertheless adequate.

Figure 8



Basis upon which Canadian courts dismissed disqualification motions alleging that counsel had obtained relevant confidential information from the opposing party (1990–2018).

Although the data reveals that courts do not invariably require a conflict screen to satisfy all law society guidelines, it confirms that if screening measures do not satisfy all law society guidelines or are not set up in a timely way the courts are very likely to find that they are insufficient to rebut the presumption that lawyers working together share confidences—law firms were disqualified in 85% of cases where the courts found the screen was either incomplete or implemented late.¹²³

D. Tactical Removal Motions

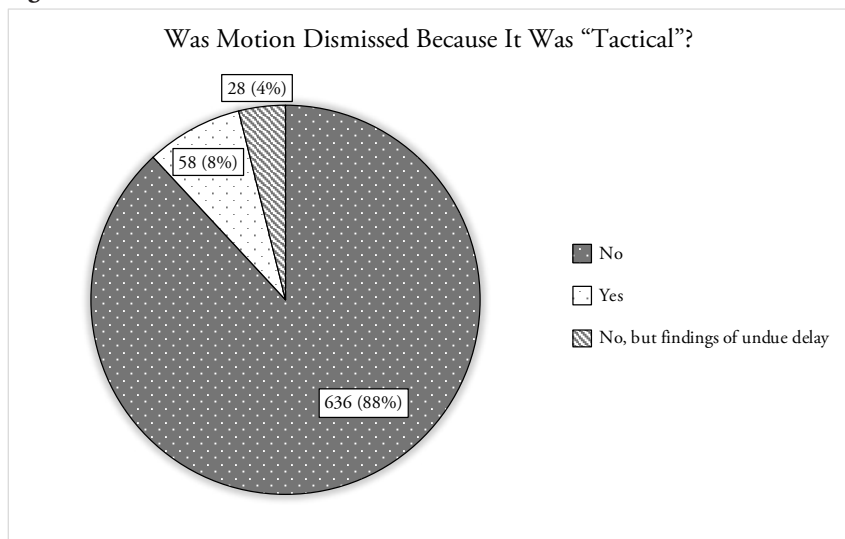
Parties responding to disqualification motions frequently allege the motion is merely tactical. As noted above, however, the Supreme Court of Canada appeared to set a very high bar in *McKercher* for findings that a removal motion is tactical rather than principled, suggesting that such findings would be made

123. Out of the 183 cases in which the courts held that the screening measures were either incomplete or implemented late, in only 27 did the courts find the measures taken by the firm were sufficient to rebut the presumption that lawyers working together share confidences.

only if the moving party had purposefully spread out its legal work so as to engage the bright line rule or to create obstacles to their opponent securing representation.

The data in this study demonstrates that although findings that a motion is tactical are not altogether common, courts are not maintaining the very high standard alluded to in *McKercher*. In fifty-eight cases, courts found that moving parties had brought disqualification motions for tactical reasons, and cited this finding as at least one of the bases for dismissing the motion.

Figure 9



Number and proportion of Canadian disqualification motions in which the courts found that the motion was initiated for tactical reasons rather than on a principled basis (1990–2018).

In a further twenty-eight cases, without finding that the motion was brought for tactical reasons, the courts dismissed the motion at least in part because of the moving party’s undue delay in bringing the motion, which suggested that they had waived their right to object to any alleged conflict.

In the fifty-eight motions found to be tactical rather than principled, courts characterized as tactical conduct that fell short of the nefarious standard referred to in *McKercher*. This is a welcome revelation, as the suggestion in *McKercher* that a client must *intentionally* create situations that would engage the bright line rule or create a conflict of interest “as a means of depriving adversaries of their choice of counsel” set an impractical and unworkable threshold.¹²⁴

124. *Supra* note 5 at para 36.

The grounds upon which courts have found that motions were brought for tactical reasons since *McKercher* provide a more useful and appropriate standard. These include findings that:

- i. the motion was “a strategic ploy, designed to delay the proceeding”;¹²⁵
- ii. the motion was “a tactical decision on the part of the Plaintiff to go on the offensive in an effort to discourage the Defendants’ proposed motion”;¹²⁶
- iii. the motion was “simply an attempt to dissuade the plaintiff (respondent) from continuing with his action”;¹²⁷
- iv. a party was motivated to make baseless conflict of interest allegations (grounded in the fact the opposing law firm “may have notarized [their] documents at some point”) to avoid an upcoming trial;¹²⁸ and
- v. the moving party could “afford to spend copious amounts of money” pursuing the litigation, and was exploiting the responding party’s relative disadvantage in that regard.¹²⁹

IV. Analysis & Discussion

A. Summary Conclusions

The following conclusions emerge from this review of the reported decisions on disqualification motions between 1990 and 2018:

- i. Courts ordered the removal of counsel in just 41% of cases in which it was sought; in 56% of cases in which a party moved for disqualification, the courts found no conflict of interest.
- ii. Two of the leading Supreme Court of Canada cases on conflicts, *Neil* and *McKercher*, are among less than 1% of cases in which the courts found counsel was in a conflict of interest but ordered no remedy. Only nine such decisions have been rendered in the past twenty-eight years, including two (*McKercher* and *Quibell v Quibell*³⁰) in which the courts did not rule out disqualification, but rather deferred the

125. *Boktor v Reddy*, 2014 ONSC 4411 at para 59.

126. *Mannarino’s Creative Foods Inc v Pezzaniti*, 2015 ONSC 1190 at para 28.

127. *Chapates et al v Petro Canada et al*, 2004 NSSC 52 at para 37.

128. *Nordstrom v Stenco Incorporated*, 2016 ABQB 45 at para 79.

129. *Nielsen v Nielsen*, 2017 BCSC 269 at para 106.

130. See *McKercher*, *supra* note 5 at para 67; *Quibell v Quibell*, *supra* note 117.

- question of remedy to be determined by another court. In 3% of removal motions the court found a conflict but ordered a different remedy, such as a stay of proceedings or the imposition of conditions on counsel continuing to act.
- iii. Nearly three-quarters of orders for the removal of counsel were based on the risk of misuse of confidential information; only 17% were premised solely on a breach of the duty of loyalty. In a small number of cases, counsel was disqualified from continuing to act despite there being no risk of disclosure of confidential information or breach of the duty of loyalty, whether due to findings of other unprofessional conduct or out of concern for the public confidence in the integrity of the legal profession and the administration of justice—all of which arose in idiosyncratic circumstances.
 - iv. The vast majority of removal motions alleging a risk of misuse of confidential information turned not on the implementation or adequacy of screening measures but on the first prong of the test set out in *Martin*—that is, whether the lawyer had received confidential information relevant to the matter at hand. In 87% of disqualification motions that were dismissed, the courts found counsel had not obtained relevant confidential information; just 13% turned on findings that the law firm had implemented sufficient screening measures. 58% of the time counsel was disqualified due to a risk of disclosure of confidential information, there were no conflict screening measures in place at all.
 - v. *Chartis* was the first case in which a Canadian court disqualified a law firm despite finding that the firm had implemented a timely and comprehensive conflict screen compliant with the Law Society guidelines, concluding that it was nevertheless insufficient to protect against the risk of disclosure of confidential information. Since then, one more motion has been decided on the same basis, i.e., that despite an ethical screen the Court remained concerned about the “close working relationship” between the lawyer of record and the screened individual.¹³¹
 - vi. Although the Supreme Court of Canada set a very high bar for finding that a disqualification motion was brought for tactical reasons, courts dismissed motions on the basis that they were tactical in 8% of cases, and have not maintained an unduly high threshold requiring egregious or nefarious conduct before making such findings.

131. *Laframboise c Lepage*, *supra* note 122 at para 36 [translated by author].

B. Guidance on Conflicts Arising from the Data

The introduction to this article raised three concerns arising from the lack of useful guidance from the courts regarding what constitutes a disqualifying conflict of interest. In this section, I discuss how the insights gleaned from this study can help alleviate these concerns.

First, while it is not easy to predict the likely outcome of a disqualification motion, trends from the case law can provide some guidance. Such motions are more likely to succeed when they are premised on a well-founded concern about disclosure of relevant confidential information or a breach of the duty of loyalty; it is extremely rare for a court to remove counsel on the basis of more general concerns about unprofessional conduct or the administration of justice unrelated to either of these grounds. Put another way, while the Supreme Court of Canada in *Martin* described the need to “maintain the high standards of the legal profession and the integrity of our system of justice” as an essential policy consideration in removal motions,¹³² and courts have since maintained that this value must be given primacy on such motions,¹³³ only in exceptional circumstances does this principle transcend its status as an underlying value to serve as an independent ground for disqualification.

The data in this study also suggests that removal motions based in confidentiality concerns are likely to hinge on the first prong of the inquiry in *Martin*, rather than the adequacy or timely implementation of an ethical screen. Counsel and litigants considering bringing a disqualification motion should carefully assess whether they can establish that any information received by opposing counsel is both confidential and relevant to the matter at hand, as this is far more likely to be determinative of their success than attempts to cast doubt on the effectiveness of the law firm’s screening measures.

Second, while lawyers and law firms can never be certain that their measures to manage potential conflicts in their practice will stand up to scrutiny, the data in this study provides a helpful big picture perspective that sheds some light on the issue. It is clear that if law firms wish to address conflicts arising from transferring lawyers who may have received confidential information from an adverse party, they need to implement screening measures that comply with all law society guidelines in a timely way, i.e., before the transferring lawyer begins work.

As we know from *Chartis*, such measures are necessary but not always sufficient. But the data in this study reveals that *Chartis* represents the exception, not the rule. While its reasoning has since been applied in one other case, these cases should be put in perspective: in 96% of cases where the courts considered a timely and comprehensive conflict screen, it was held to be sufficient to rebut

132. *Supra* note 1 at 1243.

133. See e.g. *Chartis* CA, *supra* note 10 at para 70, citing *Wallace*, *supra* note 70 at para 55.

the presumption that lawyers working together share confidences. *Chartis* was the first case since *Martin* where a guideline-compliant conflict screen was held to be inadequate to satisfy the public that there was no risk of disclosure of the opposing party's confidential information, and the reasoning in *Chartis* and in the more recent decision *Laframboise c Lepage* was expressly dependent on the close working relationship between the screened lawyer and the lawyer acting adverse to the moving party.

The Court of Appeal for Ontario described *Chartis* as a case that was “most unusual given the intense working relationship” between the lawyers on the evidence submitted on the motion;¹³⁴ indeed, the conclusion in *Chartis* was expressly premised on evidence that the transferring lawyer spent fifty to sixty per cent of his time at the new firm working (on other matters) with the lawyer responsible for the case at issue. The data in this study reinforces the conclusion that *Chartis* was an aberration. Law firms managing conflicts should be careful to consider whether purportedly screened lawyers have a close working relationship that may appear to vitiate the effectiveness of otherwise acceptable screening measures. Provided this is not the case, law firms can continue to manage confidentiality-based conflicts by implementing the law societies' screening guidelines and there is a strong likelihood courts will accept such measures as sufficient to protect against the risk of disclosure.

Third, despite the troubling message emanating from the fact that in both *Neil* and *McKercher* no remedy was ordered notwithstanding the Supreme Court of Canada's findings that that counsel had “crossed the bright line” and breached their duties of loyalty, the data in this study demonstrates that this is quite a rare occurrence: *Neil* and *McKercher* are two of just nine disqualification cases in the last twenty-eight years in which the courts declined to order a remedy despite a conflict finding.¹³⁵ These cases represent just 2% of decisions in which the courts find counsel acted in a conflict of interest—and among this 2% are cases in which the conflict issue was moot because counsel had withdrawn.

Disqualification is ordered in 92% of cases where a conflict of interest is found, and the courts order other remedies (such as imposing conditions to address the conflict or ordering a stay of proceedings) in a further 6% of cases. It appears that despite concerns arising from the outcomes of *Neil* and *McKercher*, the remedies ordered in disqualification cases provide little reason to worry about a loss of public trust in the administration of justice—the courts will not condone unprofessional conduct and will take action to ensure lawyers cannot act in a conflict of interest.

134. *Supra* note 10 at para 72.

135. See *R v Neil*, *supra* note 2; *McKercher*, *supra* note 5; *R v Baltovich*, *supra* note 116; *Pliska*, *supra* note 119; *MacDonald v Spears*, *supra* note 116; *Quibell v Quibell*, *supra* note 117; *7102763 Canada Inc*, *supra* note 118; *Droit*, *supra* note 117; *Piikani Nation v Kostic*, *supra* note 116. See also the text accompanying notes 116–19.